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HOME RULE, MAJORITY RULE, AND DILLON'S RULE

RICHARD BRIFFAULT*

Clayton Gillette's *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*¹ is an ambitious attempt to breathe new life into an old local government law chestnut through the analytical tools of modern political economy. Gillette asserts that because the Rule permits state judges to invalidate local legislation that results from "one-sided lobbying," Dillon's Rule increases the allocational efficiency of local decision making and reduces the deadweight losses attendant on special interest pursuit of rent-seeking ordinances. According to Gillette, Dillon's Rule checks the danger of special interest abuse of local politics by constraining local government actions in areas prone to special interest manipulation. He contends that local residents would have consented to Dillon's Rule if it had been presented to them; indeed, he suggests the existence of Dillon's Rule may contribute to the willingness of people to submit themselves to local governments. Thus, Gillette would have us believe that Dillon's Rule—which has so often been condemned by local government scholars as antithetical to local self-government—actually vindicates the interests of local majorities and sustains local autonomy itself.

Gillette's is an ambitious thesis, appealing as much in its audacity and its analytical style as in its substantive project of finding legal rules that would promote public-regarding local self-government. Unfortunately, Gillette's effort fails. The base metal of arbitrary state judicial intervention in local decision making that is Dillon's Rule cannot be alchemically transmuted into a public interest-serving Golden Rule. To answer the question posed in his title, "public choice theory" cannot "justify" local government law—or at least Gillette's theory does not "justify" Dillon's Rule under his standard of promoting the local public interest.

Gillette's public choice defense of Dillon's Rule consists of two arguments: (1) Local governments are particularly vulnerable to special interest manipulation; and (2) Dillon's Rule is well-designed to catch and prevent such special interest abuses of the local political process. Both arguments are crucial, but neither argument is persuasive. Ultimately,

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1. 67 CHI.-KENT L. REV. 959 (1991).

Gillette's theory fails because his approach to local governments is too abstract and misses the politics actually characteristic of most localities.

In the small residential communities which are the principal setting for local government in contemporary America, politics is dominated not by the "one-sided lobbying" of manipulative minorities but, instead, by taxpayer and homeowner majorities. Gillette's paper fails to consider the reality of majority rule in many localities or how to determine whether majority decisions are special interest abuses or definitions of the local public interest. Moreover, a Dillon's Rule which is used primarily to invalidate decisions supported by local majorities is the same old anti-majoritarian Rule that has long been the target of localist invective, rather than Gillette's majority-supported anti-minority-manipulation Rule.

Regardless of whether local measures are more likely to be the product of majoritarian rather than minority influence, there is nothing in the terms of Dillon's Rule or in its judicial application that suggests that the Rule is a useful mechanism for suppressing manipulation and increasing deliberation. Special judicial scrutiny of local innovations under Dillon's Rule is both over- and underinclusive with respect to special interest manipulation of local politics. There is no particular connection between innovation and legislative manipulation; many rent-seeking municipal actions are in areas of traditional local competence and many local innovations are products of open and deliberative local processes. Moreover, Gillette's Rule presumes that state courts will be particularly adept at policing the quality of deliberation of city councils and town boards, and that they will do so while scrupulously avoiding being influenced by their own biases concerning the substances of the local measures. There is nothing in the history of Dillon's Rule to support Gillette's optimism.

I. SPECIAL INTERESTS, MAJORITY RULE, AND LOCAL GOVERNMENTS

Crucial to Gillette's thesis is the assumption that local governments must be especially subject to special interest capture. If local governments are no more subject to special interest capture than are state or federal governments, and if Dillon's Rule does the work Gillette says it does, then we would need a Dillon's Rule at all levels of government. Although there is a strand of public choice theory that supports just such heightened judicial scrutiny of economic legislation in order to save us from rent-seeking behavior in Congress and the state legislatures,² Gil-

2. See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 63-73

lette does not make this argument nor does he call for a general return to *Lochner*-style judicial review. Rather, his concern is with the particular susceptibility of *local* governments to special interest manipulation.

According to Gillette,

local issues have characteristics that tend to exacerbate both formation of privileged groups and free riding by latent groups. The possibility that interest groups are particularly likely to form at the local level stems from that body of collective action theory that suggests the possibility of collective action is directly related to size of the affected group.³

As Gillette notes, the costs of organization will be lower when the number of people to be organized is small, and the ability to prevent defections and free riding will be much greater where small size increases the importance of reputation and the capacity for monitoring group members. Thus, the small size of many localities will make it easier for interest groups to function.

Gillette, however, does not purport to criticize the role of interest groups *per se*. Indeed, the standard public choice account of the American political process is one of interest group conflict. We assume that interest groups will form, and we rely on groups to safeguard their own interests and to constrain each other. So long as the fights are fair, all groups have access to the process, and "discrete and insular" minorities are defended from the consequences of political isolation and repeated defeat, we ordinarily treat the results of interest group battles as acceptable products of representative democracy. Interest group conflict may not be a pretty picture but it is endemic to American government.

Gillette, however, asserts that at the local level the interest group fights will not be fair and the outcome of interest groups battles will, thus, be suspect. Local governments, he contends, are particularly susceptible to "one-sided" interest group lobbying. Some groups—the "privileged" groups—will form; but other groups—"latent groups"—will fail to coalesce. Without sufficient opposition from the "latent groups," the "privileged groups" will dominate the local politics and subvert local government to their own ends.

Again, Gillette's thesis requires that such asymmetrical lobbying be more likely at the local level than at the state or nation, lest we need a Dillon's Rule for all levels of government. But nothing in Gillette's article supports his assumption that local governments are particularly

(1991) (presenting and criticizing this use of public choice theory to support heightened judicial scrutiny of economic regulation generally).

3. Gillette, *supra* note 1, at 981.

prone to one-sided lobbying. Indeed, Gillette's own argument concerning the significance of the relatively small size of local polities cuts the other way.

The theory of collective action tells us that small groups will tend to have an edge over large groups in attempting to organize and in maintaining their organizational existence.⁴ As Gillette points out, at the local level the small groups—the special interests—are likely to be especially small and therefore especially easy to organize. But at the local level, particularly in small towns and residential suburbs, even the “large,” arguably latent, groups will also often be relatively small. Certainly, in most local polities the difference in scale between small groups and large groups is likely to be much less than at the state or national level. At the state level, “developers” and “landlords”—to mention two of Gillette's “privileged” groups—may number in the hundreds or thousands, while in a locality they may number in the dozens or single digits, so they are more likely to coalesce at the municipal level. But in the same locality their latent opponents—“preservationists,” “homeowners,” “tenants”—may number only in the hundreds or single-digit thousands—far less than the relatively unorganizable hundreds of thousands or millions of preservationists, homeowners, or tenants at the state level.

Half of all municipal corporations have populations of 1,000 or fewer, and three-quarters of all municipalities have 5,000 people or fewer. Nearly half of all urban Americans live in municipalities of fewer than 50,000 people.⁵ If small size is the key to organization—and Gillette suggests it is the basis for the advantage of the “privileged” over the “latent”—then the small size of most localities should enable most groups of local interests to form in those communities. Even larger localities are smaller than the states and the nation of which they are a part. In general, the smaller size of localities, relative to state and nation, should make it easier not more difficult for otherwise “latent” groups to coalesce at the local level.

In any event, the scale of the disparity between privileged special interests and other latent groups should be considerably narrower at the local level. In small towns and residential suburbs, where the membership of privileged groups may number in the tens and the residents who fall into the latent groups may be counted in the thousands, the gap in

4. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 53-57 (1971).

5. 1 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1982 CENSUS OF GOVERNMENTS 8-9 (table 6) (Aug. 1983).

potential for organization may be 1:100; but in the states, even if the special interests number in the hundreds and thousands, the members of the latent groups will number in the hundred thousands and millions, for a disparity of 1:1000 or 1:10,000. Surely, the asymmetry of special interest formation should dictate a Dillon's Rule for the nation and the states before it is imposed on local governments.

A second, and more serious, objection follows from Gillette's failure to consider fully the significance of the small size of local governments. Although his critique of special interest domination suggests that special interests will be privileged minorities, at the local level "privileged" special interests will often be local majorities. Indeed, the theoretical and empirical literature on local government suggests that the important decisions of the typical municipality will often reflect the interests and policies of local majorities.

In the American political tradition, the most famous statement concerning the potential for majoritarian control of local political institutions is Madison's. As he put it in the Tenth Federalist,

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.⁶

Madison's original insight concerning the majoritarian propensities of smaller units is supported by Tiebout's critique and borne out by recent studies of suburban politics. According to the Tiebout model, the large number of local governments and the relative ease of movement among them mean that people will be drawn to localities providing the types and levels of services they desire. People will sort themselves out by settling in the jurisdictions whose mix of taxes, services, and regulations they prefer and by leaving the localities whose tax-service-regulation packages they dislike. As a result, local governments will draw the people whose preferences most resemble those of the currently dominant political groups, while they lose local dissenters and fail to attract people who do not agree with local public decisions. Localities will tend to become more homogeneous so that more and more people will belong to local majorities.⁷

In contemporary American metropolitan areas, suburban communi-

6. THE FEDERALIST No. 10 (James Madison).

7. See, e.g., ROBERT L. BISH, *THE PUBLIC ECONOMY OF METROPOLITAN AREAS* 51-52 (1971).

ties are, in fact, increasingly homogeneous. Most suburbs are specialized according to economic function—they are either residential or industrial but rarely both⁸—and the ethnicity and income of their residents.⁹ The increasing number of municipal governments in metropolitan areas has actually led to greater demographic homogeneity within particular local units much as it has enhanced interlocal ethnic and wealth differences.¹⁰ Small size, Tieboutian sorting and ethnic and economic stratification mean that the populations of many localities are relatively homogeneous in social and economic terms and in the political interests they would like their local governments to advance.

In these communities it should be particularly easy for majorities to form and to see their fiscal, service and regulatory preferences enacted into local law. Indeed, suburban politics is frequently characterized as dominated by local homeowner or taxpayer majorities, and local land use policies such as exclusionary zoning and growth controls are plainly the products of local majority rule.¹¹

At times Gillette seems to recognize the likelihood of majoritarian control of local politics. After all, who are his “privileged” groups and who are the “latent” ones? Gillette never actually provides a standard for distinguishing the privileged from the latent other than at the purely tautological level that the privileged groups do form and the latent ones do not. But his examples of privileged groups hint at the possibility that privileged groups will in fact represent local majorities. Some of his examples of the “privileged” are real estate developers¹² and landlords¹³ who threaten to use their influence and campaign contributions to swamp the latent interests of “preservationists” and “tenants.” But his “privileged groups” also include large, diffuse and not especially privi-

8. See, e.g., John R. Logan, *Industrialization and the Stratification of Cities in Suburban Regions*, 82 AM. J. SOC. 333, 334, 341 (1976).

9. Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346, 436 (1990).

10. See, e.g., GREGORY R. WEIHER, *THE FRACTURED METROPOLIS: POLITICAL FRAGMENTATION AND METROPOLITAN SEGREGATION* (1991); Richard Child Hill, *Separate and Unequal: Governmental Inequality in the Metropolis*, 68 AM. POL. SCI. REV. 1557 (1974). Although the number of poor and working class people and racial minorities in the suburbs continues to increase, the increased heterogeneity of suburbia as a whole is usually not matched by a greater ethnic diversity within particular suburbs. Douglass S. Massey & Nancy A. Denton, *Suburbanization and Segregation in U.S. Metropolitan Areas*, 94 AM. J. SOC. 592 (1988).

11. See, e.g., MARK BALDASSARE, *TROUBLE IN PARADISE: THE SUBURBAN TRANSFORMATION IN AMERICA* (1986); CONSTANCE PERIN, *EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA* (1977); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 405-07 (1977).

12. Gillette, *supra* note 1, at 979.

13. *Id.* at 986.

leged interests: "parents . . . the elderly. . . the poor."¹⁴ If parents, the elderly, and the poor can be "privileged," then it is hard to imagine who will be "latent," or why domination by these "privileged" groups would be inconsistent with the preferences of local majorities.

Moreover, Gillette's two test cases—the impact fee decisions and the non-delegation doctrine case—both appear to concern local political decisions that reflect the preferences of local majorities. Impact fees, like growth controls and exclusionary zoning, are often a product of majority rule and not minority manipulation. When they adopt impact fees, communities are seeking to restrain growth or to shift the costs of growth to developers and to non-residents. Impact fees protect the local tax base by requiring developers to install new infrastructure or to contribute to the local fisc. By making new homes slightly more expensive, impact fees tend to assure that future residents will be more affluent than they might otherwise have been, which also contributes to the fiscal and economic well-being of the locality from the perspective of current residents. This may be unfair and it will sometimes be exclusionary, but it is surely a result of the active political support of a current local majority, not manipulation by a local special interest.¹⁵

The non-delegation cases are less clear-cut, but nothing in Gillette's story suggests that these are instances of intramural one-sided lobbying. Rather, it would seem that when a local government enters into a long-term contract with other localities or with an out-of-state public authority in order to assure its residents a future supply of electricity, it is attempting to act in behalf of the public interest of the community as a whole. The local government's action may be improvident, may fail to take into account the risk a "take or pay" obligation poses for a community, and may be the result of the limited administrative capacity of a small municipality to calculate the risks of the obligation it has assumed. But a local government's error in seeking to advance the local public interest is not the same thing as special interest manipulation.

To be sure, not all local governments are small, and not all municipal actions reflect majority support. The local political processes in New

14. *Id.* at 982.

15. Gillette suggests that the use of Dillon's Rule in impact fee cases fits within his theory because impact fee cases involve an "intramural" conflict between present and potential future residents. I suggest that impact fee cases are a lot closer to growth controls and exclusionary zoning, with the relevant conflicts those between residents and outsiders, and between communities seeking to limit growth and other communities in the surrounding region. Judicial scrutiny of impact fees through the lens of externalities and spillovers would be more likely to focus the courts on the real problems posed by such fees than would Gillette's approach of directing the courts to a close examination of the quality of the "intramural" deliberative process that precedes the adoption of a fee requirement.

York, Chicago and other big cities are notorious for special interest manipulation. In the big cities, local residents are ripe for exploitation by rent-seeking "privileged" groups. But the big cities are the exception that proves the rule. As Robert Dahl once put it, "[t]o regard the government of New York as a local government is to make nonsense of the term."¹⁶ With their large and demographically diverse populations; their mix of residential, industrial and commercial land uses; and their enormous local public sectors and social service budgets, the big cities are politically, economically, and socially far from the local government norm found in the suburbs. Indeed, if Gillette's picture of local governments as prone to special interest manipulation fits the big cities, then the characteristics that distinguish the big cities from other local governments suggest that Gillette's theory would fit the states and the federal government far better.

Of course, to say that on many important local issues the local political process is likely to reflect majoritarian political sentiment, and not minority manipulation, does not necessarily refute Gillette's assertion that local governments are vulnerable to special interest capture. Gillette could still be right if special interest abuse were defined to include decisions that are the preferences of the local majority. In other words, if decisions that enjoy the true and active support of a current local majority may be seen as a form of rent-seeking at odds with the public interest, then majority domination of local politics would be no protection against special interest control and no guarantee of public-interest-oriented decision making. Indeed, given the likelihood of majority rule in many smaller localities, local governments would in fact be particularly vulnerable to the dangers of majority-rule-as-special-interest-manipulation.

Gillette may be right in some objective, Olympian sense. Majorities can be mistaken, majorities can be short-sighted, and majorities can be selfish. Majority actions may be inconsistent with the best interests—the public interest—of the community. But if majority rule, in the sense of local decisions that reflect the true and active support of current majorities, does not define the local public interest, then what does? How are we to know the local public interest apart from the interest of local majorities—and apart from our own personal biases with respect to the "right" outcomes of particular local issues? Gillette never tells us how to tell whether a measure enjoying local majority support defines the local public interest or is, instead, the product of the majority-as-special-interest.

16. Robert A. Dahl, *The City in the Future of Democracy*, 61 AM. POL. SCI. REV. 953, 968 (1967).

A theory predicated on the protection of the local public interest through the restriction of local special interests must have a standard for distinguishing the public interest from the special interests. One metric would be whether a measure reflects the preferences of the majority of the polity; but as local government actions are far more likely to reflect majority preferences than state or national actions, local government is a particularly unlikely candidate for the public-interest-promoting and special-interest-controlling features that Gillette finds in Dillon's Rule. If majority preference is not the standard for determining the local public interest, what is? Gillette cannot justify Dillon's Rule as a doctrine for vindicating the local public interest without a theory of what the local public interest is apart from the preferences of local majorities. And his article presents no such theory.

Moreover, once the small size, relatively homogeneous preferences and populations, and residential orientations of most local governments are factored into the account of local politics, then Gillette's Rule begins to look suspiciously like the old Dillon's Rule—the nineteenth century doctrine for limiting local power and constraining local majorities—rather than Gillette's majority-protecting, minority-constraining Rule. As I have suggested, in many local governments the targets of Dillon's Rule interventions will be measures adopted with majority support, whether those majorities are deemed special interests or the public interest. It becomes difficult to accept Gillette's assertion that these politically empowered local majorities would treat Dillon's Rule as desirable and would consent to the close judicial scrutiny and haphazard judicial invalidation of local measures built into Dillon's Rule. Despite his commitment to local government in principle, Gillette's modern public choice account of Dillon's Rule, by subjecting decisions enjoying local majority support to intrusive judicial review, is in the end as antithetical to local autonomy as the traditional justification of Dillon's Rule in terms of the hierarchical inferiority of local governments.

II. INNOVATION AND OPPRESSION

Gillette's second principal argument is that, assuming one finds that local governments are particularly susceptible to special interest manipulation, Dillon's Rule is the doctrine which will remedy the problem. This entails the further arguments that Dillon's Rule is well-designed to catch these abuses, and that the benefits of a Dillon's Rule used for these purposes outweigh the costs.

Is Dillon's Rule well-designed to "identify those discrete sets of

cases in which such [one-sided] lobbying [is] likely to occur"?¹⁷ Gillette sees a connection between one-sided lobbying and innovative local ordinances. Dillon's Rule, he notes, will most often be invoked in cases of "municipal entrance into a novel activity, not expressly within the realm of activities considered by the legislature."¹⁸ Innovation, thus, is a prerequisite for a Dillon's Rule claim. But what does innovation have to do with "one-sided lobbying" or with the special interest manipulation which Gillette posits as the basis for judicial intrusion?

According to Gillette,

[t]he most likely situation in which debate will reveal one-sided lobbying arises when a locality is asked to invest in a relatively novel enterprise. At that time, interests partial to the proposal will have had an opportunity to organize and plan a strategy. Competing interests, however, may have had insufficient opportunities to coalesce, even if they are otherwise able to do so.¹⁹

Thus, Dillon's Rule, "which is directed at relatively novel local activities, appears appropriate to curtail the most likely instances of one-sided lobbying."²⁰

Gillette's suggestion of a nexus between innovation and one-sided lobbying is interesting, but it is also entirely unsubstantiated by any authority and appears largely intuitive. I have a counterintuition—which is equally unsupported but no less plausible—that local debate is actually most likely to occur with respect to innovations, experiments, and other unprecedented municipal actions.

For many people, there is both a natural resistance to change and a preference for stability. As the literature on referendum voting has found, when people do not understand the meaning of a ballot proposition they usually vote "no" on the assumption that "no" means no change, and that no change is safer than any new action.²¹ People in power are even more likely to be invested in the status quo. After all, they have been successful under existing rules and arrangements; a change, especially a change that entails new regulation or higher taxes, may be particularly unattractive to them. Thus, innovation has to overcome considerable political inertia and the natural resistance of dominant groups.

Given the preference for stability, I would assume—it is only a guess, but then Gillette's argument is also only a guess—that local debate

17. Gillette, *supra* note 1, at 984.

18. *Id.*

19. *Id.* at 990.

20. *Id.*

21. Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1356-57 (1985).

is particularly likely to occur when a new and innovative proposal is being considered. An innovation may alter the status quo, effect a redistribution of municipal resources, or create new targets for municipal regulatory attention. The unusual format or content of a municipal innovation—the proposal for a new tax or fee, for a new regulatory restriction on developers or homeowners or landlords, for a new agency or department to house or operate a new municipal enterprise—may trigger the attention of local interest groups, lead to demands that the local government proceed slowly so that all parties can study the matter and assess its implications for them, and spark opposition and protests from groups who would be subject to new controls or requirements. An innovation by definition is not business as usual, and it is the unusual which invites attention and leads people to think about the implications of government action for them.

There is, in addition, an odd tension between Gillette's justification of Dillon's Rule and the traditional defense of local autonomy in terms of the opportunities decentralization provides for public experimentation and creativity. Local autonomy—home rule—provides the possibility for "laboratories of democracy," in which important public sector ideas will first be conceived, developed, and tested at the local level, and then, perhaps, be emulated by other localities or adopted by higher level units of government. This notion of the desirability of "grass roots" or "bottom up" innovation, rather than an exclusive reliance on central direction and central planning, has long accounted for part of the appeal of local autonomy in the American political tradition.

Gillette appears to recognize the dissonance between our historic commitment to local creativity and his suspicion of local innovation when he states that the targeting of close judicial scrutiny on "novel" municipal actions "is not to say that novel activities are undesirable or to refute the laboratory model of local government."²² Yet it is hard to read his linking of novel activities to one-sided lobbying without drawing the inference that local innovation is a symptom of a cancerous condition on the local body politic rather than a sign of the health of the system of local governments.

Not only does Gillette have the relationship between innovation and the sufficiency of debate backwards, his use of Dillon's Rule to police one-sided lobbying seems dramatically underinclusive. Many rent-seeking activities occur in areas of long-standing local competence. Interest group conflict is endemic to such traditional municipal actions as con-

22. Gillette, *supra* note 1, at 985.

tracts for the purchase of goods and services; the sale, lease or licensing of municipal lands; the siting of municipal facilities, like police and fire stations or water and sewer mains; the granting of franchises; and the most basic decisions of who and what to tax and who to benefit by public spending.

The pursuit of self-interest is the stuff of politics, and there would not appear to be any necessary connection between innovation and the ongoing private feeding at the public trough. Indeed, as I have suggested, innovative forms of regulating, taxing, or spending are likely to set off alarm bells in local politics and lead to the kind of intramural debate that Gillette sees as the antidote to special interest abuse.

Finally, even if Gillette were right that innovations are a particular cause for concern, is there any evidence that state courts can do what Gillette wants them to do—review the local political process to determine whether a novel measure was the product of one-sided lobbying or of legislative deliberation in which all affected interests were heard?

Some evidence that courts cannot be expected to do this is that Gillette offers virtually no evidence that they have ever done it. Indeed, it is striking that in a 61-page article that purports to justify Dillon's Rule, Gillette presents at most one case in which a state court applied Dillon's Rule correctly, and even in that case the court's outcome did not hinge solely on Dillon's Rule. In his analysis of the leading Dillon's Rule case, *Early Estates*,²³ Gillette concludes the Court got the analysis wrong and intervened "in the absence of any breakdown of the political process."²⁴ In one of the impact fee cases—*Guilderland*²⁵—the decision turned on state preemption and not Dillon's Rule. In *Vermont Public Service*²⁶—the decision involved the nondelegation doctrine, not Dillon's Rule. Only in *Kamhi*,²⁷ the other impact fee case, did the court's decision involve some consideration of the local legislative process that led to the adoption of the contested fee and include a finding that the matter was beyond the scope of local power to legislate. Even in *Kamhi*, the Court was concerned not with the quality of local debate but with the town's failure to satisfy the formal requisites for local legislative action for the adoption of impact fees.²⁸

More generally, the task Gillette would impose on state courts

23. *Early Estates v. Housing Bd. of Review of Providence*, 174 A.2d 117 (R.I. 1961).

24. Gillette, *supra* note 1, at 989.

25. *Albany Area Builders Ass'n v. Town of Guilderland*, 546 N.E.2d 920 (N.Y. 1989).

26. *Vermont Dep't of Pub. Serv. v. Massachusetts Mun. Wholesale Elec. Co.*, 558 A.2d 215 (Vt. 1988), *cert. denied*, 493 U.S. 872 (1989).

27. *Kamhi v. Town of Yorktown*, 547 N.E.2d 346 (N.Y. 1989).

28. Gillette, *supra* note 1, at 1002-03.

under the rubric of Dillon's Rule is an impossible one. Gillette would like the courts to reopen the local political process, but in the vast majority of localities there is virtually no legislative history or similar materials that a court could turn to in order to determine the quality—the "one—" or "two-sidedness"—of municipal debate. Courts would be virtually flying blind if the nature and extent of local legislative debate were to be the focus of Dillon's Rule. Alternatively, if Gillette's Dillon's Rule were to turn into a requirement that local governments generate legislative histories and act only on a written record, that would be an unprecedented and burdensome requirement for local legislative bodies to meet. Indeed, it would be a requirement that most state legislatures cannot satisfy.

Further, even if somehow a local legislative history could be mustered and a court could inform itself about the debate that preceded the enactment of a challenged ordinance, just how much internal debate would constitute adequate debate and disprove a claim of "one-sided lobbying?" Would a formal recitation of the pro's and con's for the adoption of an ordinance suffice, or would the debate have to involve a "real" ventilation of all the relevant issues? There are few standards for judging the quality of a debate after the fact and based on scanty legislative materials. There is certainly the danger, as Gillette delicately puts it, that judges "may too readily identify their own perception of the good with that of the public at large,"²⁹ so that judicial concern with the nature of local debate may slide into judicial hostility to the terms of the measure.

Under these circumstances, a local ordinance may fail because of judicial opposition to its substance rather than judicial dissatisfaction with the quality of the city council's deliberations. We would, then, have the nineteenth century Dillon's Rule of arbitrary, outcome-oriented judicial intrusion into local autonomy, rather than the focused, public-interest-protecting, public choice analysis that Gillette envisions.

* * *

The costs of Dillon's Rule are high. The Rule permits close judicial review and results in judicial invalidation of local measures which do not violate constitutional limits on governments generally, which are not preempted by federal or state laws, and which do not impose external burdens on nonresidents.³⁰ Moreover, the Rule's lack of clarity results in

29. *Id.* at 998.

30. As Gillette notes, "the presence of externalities can neither explain nor justify Dillon's Rule, because activities that generate significant spillovers do not fall within the domain covered by the Rule in the first place." Gillette, *supra* note 1, at 972. In other words, Dillon's Rule applies to

inconsistent outcomes and permits decisions based on the substantive biases of state judges rather than on an informed appraisal of the proper scope of local power. Dillon's Rule chills local autonomy in practice, by causing the invalidation of local measures and by inducing local residents (and local governments) to seek state political solutions to local problems out of a concern that a local ordinance might not withstand judicial scrutiny. And Dillon's Rule is hostile to local autonomy in theory because it embodies a view of local governments as limited agents of the state rather than plenary representatives of local people.³¹

I suppose a case for Dillon's Rule can be made, but that is a case that would be grounded in a suspicion of local autonomy even with respect to matters that are local. That is not the case Gillette has made. Gillette seeks to ground Dillon's Rule in a commitment to local autonomy, even to show that Dillon's Rule actually facilitates local autonomy. But although his theory is ambitious and artfully argued it fails to persuade. With or without public choice, Dillon's Rule is doctrine for judicial displacement of the decisions of local majorities with respect to local matters. And that is the negation of local autonomy.

"activities deemed properly within the local realm under some independent metric," *id.*, and other legal doctrines are used to control local actions with significant external effects.

31. Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 (1990).